No. 15315

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

M. W. ENGLEMAN, as Assignee for the Benefit of Creditors Generally of Campagnola Food Products, Inc., a corporation,

Appellant,

vs.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION and INSURANCE COMPANY OF NORTH AMERICA, a corporation,

Appellees.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Albert Lee Stephens, Chief Judge, and to the Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Appellant respectfully petitions this Honorable Court for a rehearing on the grounds hereinafter stated.

Introduction and Statement of Reasons for the Granting of a Petition for Rehearing.

This is not the *pro forma* petition of a disappointed litigant, filed simply to urge again an already rejected theory of his case. The reason for this petition is that the opinion of the Court raises, for the first time in this case, certain fundamental issues concerning the rights

of litigants in the Federal courts. These issues have not been previously briefed or argued. Involved are the Seventh Amendment to the United States Constitution, the interpretation of Federal Rules of Civil Procedure 41(b), 50(a) and 52, and the impact of the Court's opinion upon the doctrine of *Erie Railroad v. Tompkins,* 304 U. S. 64 (1938).

A rehearing is strongly urged for the following reasons:

1. The Opinion of this Court holding that the judgment below should not be reversed unless "clearly erroneous" is at variance with the established rules of appellate review of jury cases dismissed at the close of plaintiff's case and seriously prejudices appellant's rights under the Seventh Amendment.

2. Appellant has been deprived of a jury trial on a critical question of fact—had a reasonable time for reply elapsed between the making of the offer and the fire.

For these reasons, a rehearing should be granted and the judgment reversed.

ARGUMENT.

I.

Upon Appellate Review of a Judgment Based Upon Dismissal at Close of Plaintiff's Case, in a Jury Trial, the Test Is Not Whether the Trial Judge's Ruling Was "Clearly Erroneous". Rather, Plaintiff Is Entitled to the Benefit of Every Inference Which Can Reasonably Be Drawn From the Evidence Viewed Most Favorably to Him.

This was a jury trial. The trial court's ruling took the case from the jury, at the close of plaintiff's case in chief. The opinion of this Court states (page two) that the test on review is whether or not that ruling was "clearly erroneous."

Until the decision of this case we had not understood this to be the rule of review when a case is taken from the jury.

Time after time the Federal Courts have announced the rule in words similar to those used by this Court in *Kingston v. McGrath,* 232 F. 2d 495, 497 (1955) (Diversity jurisdiction, malpractice case):

> "Upon appeal from a judgment of dismissal entered upon the close of a plaintiff's case-in-chief, the appellant is entitled to the benefit of every inference which can reasonably be drawn from the evidence viewed in the light most favorable to the claim or cause of action asserted. *Gunning v. Cooley,* 1930, 281 U. S. 90, 94, 50 S. Ct. 231, 74 L. Ed. 720; *Schnee v. Southern Pacific Co.,* 9 Cir., 1951, 186 Fed. 2d 745, 746; *Graham v. Atchison, T. & S. F. Ry. Co.,* 9 Cir., 1949, 176 Fed. 2d 819, 823; . . .
>
> "As said in *Wilkerson v. McCarthy,* 1949, 336 U. S. 53, 67, 69 S. Ct. 413, 415, 93 L. Ed. 497:

> 'It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case * * *.'"

See also *Barron & Holtzoff,* 2 Federal Practice and Procedure 641 (1950); 5 Moore's Federal Practice 231, for similar statements.

This Court has recently underscored the meaning of and necessity for the rule. *Smith v. Buck,* 245 F. 2d 348, 349 (1957) (diversity jurisdiction; negligence case):

> "In considering a case of this kind, we should take note of the precedents established by the Supreme Court as to when it is proper to take a case from the jury. For although this is a diversity case, it was tried in a federal court where considerations relating to the Seventh Amendment must prevail. It is incumbent upon us to be guided by such cases as *Williams v. Carolina Life Insurance Co.,* 348 U. S. 802, 75 S. Ct. 30, 99 L. Ed. 633, and *Gibson v. Phillips Petroleum Co.,* 352 U. S. 874, 77 S. Ct. 16, 1 L. Ed. 2d 77."

The opinion of this Court, in announcing a new rule for appellate review of judgments such as the one in this case, stands squarely in opposition to prior decisions of this Court, to the decisions of the other Courts of Appeal, and to the decisions of the United States Supreme Court (*cf. Jacob v. City of New York,* 315 U. S. 752, 753 (1942)).

Furthermore, the present opinion is at variance with *Kingston v. McGrath, supra,* 232 F. 2d 495, 497 (9th Cir. 1955), in other important particulars: Should the

motion be considered as made under Rule 50 or Rule 41? Perhaps the Court in this case, in holding that the motion for directed verdict was "properly treated" under Rule 41 (Op. p. 2) used the tests for dismissal applicable in non-jury cases. Moreover, the Court in this case is silent on lack of findings. They were not waived [Tr. 210]. They are required by Fed. R. Civ. Proc. 41(b) and Rule 52. The *Kingston* case, *supra,* at 497, comments on the failure to make findings in an indistinguishable situation.

The critical problem here is that the Court, in applying the "clearly erroneous" test did not give plaintiff the benefit of all the inferences from the evidence, construed most favorably in his favor. Under the Seventh Amendment it was bound to do so. Because the case turns on whether or not there was evidence of what was a reasonable time for acceptance of the offer (see, Op. pp. 6-7, 13. "There was no evidence introduced as to what the reasonable time is or should be . . ." (p. 7)), the method of review has resulted in the loss to appellant of federally guaranteed rights.

On the basis of the Court's own opinion, the critical question is whether or not there was evidence of reasonable time. We submit that, if considered under the well-established rules of appellate review set forth above, plaintiff was entitled to have that question go to the jury. The evidence is considered under Point II, *infra.*

II.

Appellant Has Been Deprived of a Jury Trial on a Critical Issue of Fact: Had a Reasonable Time for Reply Elapsed Between the Date the Offer Was Communicated and the Date of the Fire.

We submit that unless the judgment is reversed, plaintiff will have been denied his rights under the Seventh Amendment. *Smith v. Buck, supra,* 245 F. 2d 348, 349 (9th Cir., 1957); *Jacob v. City of New York,* 315 U. S. 752 (1942).

The court holds that the plaintiff would be entitled to submit his case to the jury if there were some evidence of what was a reasonable time for acceptance or rejection of the offers for increased coverage (Op. pp. 6, 7, 13).

Love testified "that the custom was that if the applications (memoranda) were to be rejected, it was to be done 'at once'" [Op. p. 6; Tr. 156].

A. We submit that this testimony alone gave a content to what was a reasonable time. The words "at once" are not words of art. It is an everyday expression which the jury can evaluate as a question of fact. This court has previously had occasion to determine what the words mean:

> "The Supreme Court of New Hampshire (Ward v. Maryland Casualty Co., 71 N. H. 262, 51 Atl. 900, 93 Am. St. Rep. 514), in determining the meaning of the word 'immediate' used in a like sense as the words 'at once' in the present policy, has held that it signifies due diligence under the circumstances of the case, and without unnecessary and unreasonable delay, *and that whether the notice is so given is a question of fact.* This case has the express approval of the federal Supreme Court. Fidelity &

Deposit Co. v. Courtney, 186 U. S. 342, 346, 22 Sup. Ct. 833, 46 L. Ed. 1193." (Emphasis supplied).

Empire State Surety Co. v. Northwest Lumber Co., 203 Fed. 417, 420 (9th Cir., 1913).

Certainly the jury could have been instructed in the language of the *Empire State* case and come to an intelligent verdict.

See also, California Civil Code, Sections 1963(20) and 1961 (presumption that ordinary course of business has been followed).

Moreover, other evidence in the case gives content to the meaning of reasonable time. Love, it may be inferred from the evidence, thought the insurance was in force and therefore made no effort to place it elsewhere [Tr. 189-191]. One Court, in determining what the words "at once" meant held that it would be guided by the actual construction placed thereon by the persons concerned. *Christenson v. Gorton-Pew Fisheries Co.*, 8 F. 2d 689, 691 (2nd Cir., 1925). In this case there was evidence of the construction of at least one interested party. That construction favors plaintiff. The words themselves have content. The words were actually construed by a person familiar with the customs of the business and relied upon by him. Under these facts alone, plaintiff is entitled to a jury trial.

B. "The question of what constitutes an unreasonable delay which will imply an acceptance of the policy has generally been held to be a question of fact for the jury or the trial court acting as a trier of facts, under the particular circumstances of each case."

29 *Am. Jur.* 1957 Supp. p. 229.

Cases are collected at 32 A. L. R. 2d 501.

American Life Ins. Co. of Alabama v. Hutcheson, 109 F. 2d 424, 427 (10th Cir. 1940) (cert. den., 310 U. S. 625).

C. As an alternative ground, we submit that California law imposed on the insurer a duty to speak. *Stark v. Pioneer Casualty Co.,* 139 Cal. App. 575, 580 (1934). The duty found in the *Stark* case is predicated on the public duty of insurers. The result follows here, *a fortiori,* where the applicant is *already* insured with the offeree. While the *Stark* case was based on negligence, this should not be a point of distinction. The case establishes a duty to speak within a reasonable time. As pointed out in *America Life Ins. Co. of Alabama v. Hutcheson, supra,* 109 F. 2d 424 (10th Cir., 1940), it makes little difference whether the theory is tort or contract. The Supreme Court of Wisconsin put it this way:

> ". . . courts have had more difficulty in ascertaining the correct basis of liability than in holding an insurer liable under such circumstances. . . . If the insurer is under such a duty [to act on the application] and fails to perform the duty within a reasonable time and, as a consequence, the applicant sustains damage, it is not vastly important that the legal relationship be placed in a particular category."

Kukuska v. Home Mutual Hail-Tornado Ins. Co., 204 Wis. 166, 235 N. W. 403 (1931).

D. There is a further ground for reversal in the interests of justice.

The judgment of the District Court was based on the ground that the terms of the offer were not spelled out in sufficient detail. [Tr. 204, 208.] The judgment of

the District Court was *not* based on lack of acceptance of whatever had been offered. Moreover, the trial judge made no findings of fact, contrary to the clear language of Federal Rules of Civil Procedure 41(b), and 52. [See Tr. 210.]

But the decision of this Court is based on lack of acceptance, *not* inadequacy of the terms of the offer. This is just the converse of the basis of the District Court judgment.

It requires no citation of authority to establish that one of the purposes of the motion of nonsuit under Rule 41(b) or for directed verdict under Rule 50(a), when made at the close of plaintiff's case, is to direct a party's attention to any deficiencies in his proof and accord him an opportunity to correct said deficiencies. (*Gile v. Duke,* 5 F. 2d 952, 953 (9th Cir., 1925) Rehrg. den.).) This is the rule, also, under California law. (*Eatwell v. Beck,* 41 Cal. 2d 128, 133, 257 P. 2d 643 (1953). See, also, 2 Witkin, Calif. Proc., 1862-1863.) If a different rule exists in the federal courts, it would deprive a party of substantial rights and violate the rule of the *Erie* case, 304 U. S. 64 (1938).

By means of the two different rulings by the trial court and this court, appellant has been completely deprived of the benefit of this rule. It has turned out that appellant was right in his argument in the court below. The terms of the offer were sufficient. (*Parlier Fruit Co. v. Fireman's Fund Ins. Co.,* 151 Cal. App. 2d 6, 311 P. 2d 162 (1957) (Pet. for rehrg. den., pet. for hrg. by S. Ct. of Calif. den.).) He needed no additional evidence on those matters. *But the issue of what was a reasonable time within which to accept or decline was not argued*

by either side in the court below and appellant therefore never had an opportunity to present the additional evidence which this court now deems essential. For lack of such evidence on what was a reasonable time, this court now affirms the judgment of dismissal.

It seems to us that the fundamental concepts of justice and fair play require a reversal, so that the appellant may have an opportunity to meet the grounds on which the motion for directed verdict is now upheld.

Conclusion.

For the reasons stated, a rehearing should be granted and the judgment below reversed.

Respectfully submitted,

HARRY J. MILLER,

ROBERT HAVES,

By ROBERT HAVES,

Attorneys for Appellant.

Certificate of Counsel.

I, Robert Haves, counsel for Petitioner in the above entitled action, hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay, and in my opinion is well founded in law and in fact, and proper to be filed herein.

ROBERT HAVES,

Attorney for Petitioner.